No. 16368

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

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REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

FOREWORD

Part One

Without leave of court and without consulting or asking Rayonier's consent, the government has filed a single answering brief in this cause and in cause No. 16367, *Arnhold, et al. v. United States of America, et al.* Although the two suits have been consolidated for argument, they are entirely independent; they involve different parties; the respective appellants are represented by different counsel; the concepts, presentations and contentions of appellant Rayonier are materially different in several important respects from those of appellants Arnhold, et al.; and, because of the multiplicity of defendants in the Arnhold suit, there are necessarily some basic differences in issues.

Rayonier sued only the government. Its separate contentions are few and simple. The government could have

assisted this court measurably if it had answered them separately, as the rules contemplate.

By attempting to answer both opening briefs in a single answering brief, the government indiscriminately has mixed Rayonier's distinct contentions with those of Arnhold, et al., to accommodate the government's generalized answers to both.[1] Although there are a number of places in the government's brief where this occurs, Rayonier complains especially of the generalized charge on page 33 of the government's brief. The government knows that Rayonier does not contend that the district judge found in Rayonier's favor on the cause-in-fact issue and that it does not rely or "lay stress" on the following statement from the district judge's Memorandum Decision:

> " * * * negligence chargeable to the United States proximately contributed to the spread of the fire to the 1600-acre area * * *." (R. 203)

Indeed, Rayonier joins the government in assuming that probably the district judge inadvertently overlooked amending this portion of the Memorandum Decision following appellants' post-trial motions. Rayonier's arguments in connection with this statement are found in the portion of its brief which has nothing to do with cause-in-fact and is unmistakably labeled as and confined to "Concurring Acts of God" (R. Br. 59;

[1] The government's brief compounds the confusion by making a complete restatement of the case (G. Br. 6-21), including a burdensome repetition of many noncontroversial facts, and by quarreling about characterizations given and inferences drawn from certain facts (G. Br. 24-26, 38) even though, on the basis of these same facts, the district judge found the government negligent (R. 238; Am. F. XVI, R. 234-35; Con. IV, R. 237), thereby putting the matter to rest.

see also R. Br. 36-38 and especially 37). Nevertheless, the government's brief erroneously states:

> " * * * *appellants in both cases* lay stress (A. Br. pp. 14, 29, 38; R. Br. p. 60) on a statement in the court's memorandum opinion * * * that negligence chargeable to the United States did proximately contribute to the spread of the fire to the 1600-acre area (R. 203) * * *." (G. Br. 33) (Emphasis added)

This confusion of the causes has further led to an apparent contradiction. First, the government states that the district judge did not reach the issue of whether the September weather superseded prior governmental negligence (G. Br. 59). Then, the government states in its footnote 13 the following:

> " * * * Since the fire was contained within the 1600-acre area, the sole proximate cause of the damage would still have been that factor which occasioned its flare-up onto appellants' property—namely, the unexpected and unforeseeable adverse weather conditions. * * * " (G. Br. 60)

Relying on Finding XVIII (R. 235-36), which, as the government knows, applies exclusively to the Arnhold-PAW controversy, the government seems to contend that the district judge found that the sole proximate cause of Rayonier's damage was the unforeseeable weather of September 20th (G. Br. 21). Moreover, in the portion of its brief which discusses the September 19th-20th weather (G. Br. 50-55) the government makes no attempt, as clarity would seem to dictate, to explain that its discussion applies only to "mop-up" negligence, an issue stressed only by the Arnhold appellants.

This apparent self-contradiction is harmful to a proper appreciation of Rayonier's contentions and stems from the government's failure to distinguish and answer separately the specific contentions of each of the respective appellants.

In its entire brief the government has made no attempt to give separate consideration to Rayonier's contentions except in "Introduction" (2), p. 28, in section I.B.2.(b), pp. 39-43, and in the last paragraph on page 58. All other argument bearing on Rayonier's contentions is thrown in with argument focused on the Arnhold appellants' position. In addition, argument appears in section I.A.1, p. 29 and section I.B.(2d), pp. 36-39, which, by its terms, seems to include Rayonier but in fact does not.

The result is confusing and potentially prejudicial to Rayonier. We gave serious consideration to a motion to strike the answering brief but decided against it because of the delay and expense involved and because we hope that, with the aid of this reply brief and careful consideration, this court will be able to decide the Rayonier appeal on the presentation made and issues raised by this appellant.[2]

If, as the government suggests (G. Br. 21 and elsewhere), appellants' briefs *collectively* give an inaccurate picture or urge unmeritorious contentions, Rayonier does not wish to be placed in a position of having to justify or argue anything except what is contained

[2]The motion would have been on the ground that the rules contemplate separate answers to the separate contentions of each respective appellant and exclusion of repetitious and irrelevant matter. 9th Cir. Rules 8 and 18; Supreme Court of the United States Rule 40(3) and (5).

in its own presentation. Rayonier, having attempted to limit its opening brief to essential matters, should be entitled to protection from involuntary involvement in any "shotgun" exchange between the government and the Arnhold appellants. It should be entitled to the court's considered evaluations of its separate contentions in an atmosphere free of the confusion and incorrect generalizations incident to the other case.

Therefore, Rayonier urges this court to give special care and attention to the analysis made and the distinct questions presented by its opening brief.

Part Two

The government relies unwarrantedly upon *Rayonier Incorporated v. United States,* 225 F.2d 642 (9th Cir. 1955) (G. Br. 2, 3, 4, 60, 61). As the government admits (G. Br. 2, 5), that decision is a nullity, vacated in its entirety by the Supreme Court of the United States in *Rayonier Incorporated v. United States,* 352 U.S. 315 (1957). In any event, it is now wholly without precedential value in the Rayonier case because the district judge has stated in effect that if he has erred on the cause-in-fact issue, the next question to be decided is the "act of God" issue (R. 283; R. Br. 54-55). Under these circumstances the principles of intervening negligence of others expressed in 225 F.2d 642, 644, are not germane.

Part Three

In its restatement of the case and by challenging statements in Rayonier's opening brief (G. Br. 21-22, 24-26) the government has attempted to reopen dispute

over factual contentions which have been put to rest by the district judge's findings that the government was negligent in failing to act as "promptly, vigorously and continuously" as it "was required to do in the exercise of ordinary care" on August 6 and 7 (R. 238; Am. F. XVI, R. 235; Con. IV, R. 237). All of the disputed facts involve negligent acts and omissions clearly within these findings.

At the risk of engaging in needless dispute, Rayonier, by the following examples, wishes to correct any misimpression that may have been created by the government's resurrection of a version of the facts which has been discarded by the district judge's findings. We assume this risk because a proper undertanding of these facts will go a long way toward proving that the government negligently permitted the fire to spread to the 1600 acres. It will also foreclose the possibility that Rayonier's silence might lend credence to the government's implications that Rayonier has been inaccurate or has misrepresented.

Therefore, Rayonier hereby replies to paragraphs (a) through (e), pages 24-26 of the government's brief, in the following similarly designated paragraphs. When the government through the Forest Service, undertakes the duty to fight all fires and when its district ranger knows of the existence of fire in the hazardous circumstances existing August 6, 1951:

(a) The making of futile phone calls for help from a motionless locomotive when other ample sources of effective help are available for the asking is the equivalent of doing nothing.

(b) Urgent speed on attack and prompt, vigorous, continuous, thorough and effective action in reaching and putting out the fire were of first importance (R. 238). Floe had a duty to find out and could and should have known long before 1:30 p.m. that his reliance on the locomotive was misplaced (R. 176).

(c) Delay in taking effective action was negligence.

(d) The excuse that Evans properly left the critical Heckelville spot fire to direct more men to the fire is unsatisfactory at best. Floe knew where the fire was located; the men coming were grown men and could follow directions; the site of the fire was on and near the PAW tracks and easily accessible. Traffic control at that time would appear less essential than work and intelligent direction by the fire control officer *at the fire.*

(e) Two men pumping water on one fringe of the 60-acre fire during the night is not "appreciable" fire fighting (R. Br. 24-25) as required by the Forest Service Manual and other texts or by the experts and if there were men near the scene of the fire by 4:30 a.m., August 7, they were few in number. There is no dispute as to the fact that fire fighting did not commence until between 6 and 7 a.m. (R. 177; F. XI, R. 233) A large force of men and equipment should have been actively working at daybreak, as well as continuously throughout the night. In addition, Rayonier's brief was careful to point out on the same page from which the government quotes that there were a few men tending hoses on the *south* side after dark. The statement attributed to Rayonier was related to the locomotive crew pumping water on the *west* end of the fire. It did in fact stop work at 6 or 7 p.m.

On page 38 of its brief the government unfairly implies that appellants' witnesses were not experienced fire fighters with personal knowledge of the area and that the witnesses who were experienced fire fighters with personal knowledge of the area agreed with Floe that the fire should not have been fought on the night of August 6. The court found otherwise, night fire fighting being encompassed within the term "continuously" as used in Amended Finding XVI (R. 235). This is another example of the government's needless quibbling.

In its argument in support of Finding XVI (G. Br. 36-39) the government asserts that fire fighting commenced at 4:30 a.m., August 7 (G. Br. 38). This is needless disputation. The matter was put to rest by the district judge who found that the government was negligent in failing to commence fire fighting until between 6 and 7 a.m. (R. 177; F. XI, R. 233).

SUMMARY OF REPLY

The government had numerous opportunities and an abundance of men and equipment available to take more prompt, vigorous, continuous and thorough action during the initial stages of the fire (R. Br. 36-54). If it had done so, as the district judge found it should have, it was the unanimous opinion of the experts that such action could have completely controlled and extinguished the fire at an early stage and prevented its spread into the 1600 acres on the afternoon of August 7. Six other spot fires were so controlled and extinguished. The district judge, as a layman, should have accepted this unanimous expert opinion and he failed to do so because he erroneously thought that Rayonier was required to present witnesses who concurred as to details. The government's answer (G. Br. 39-43) fails to meet this contention, for it does little more than attack the qualifications of the experts and their judgment on an issue (negligence) which the district judge decided in favor of Rayonier. No pertinent reason is supplied and no authority is cited to challenge Rayonier's conclusion that the district judge failed to give proper weight to the unanimous opinions of the same experts on the cause-in-fact issue.

The government makes an even less serious attempt to answer the second part of Rayonier's opening brief (R. Br. 54-72) on proximate and intervening cause. Its abstention from this argument (G. Br. 55-60) is based on the flimsy premise that the government considers the issue irrelevant, because it is conditioned on this court's reversal of the district judge on cause-in-fact.

Contrast this with the government's precautionary contention that it has no duty to maintain the railroad right of way (G. Br. 60-68) which is expressly conditioned on the chance that this court might hold adversely to the government on cause-in-fact as to its negligent maintenance of the right of way (G. Br. 27).

This inconsistency has led Rayonier to conclude, as it feels this court shall, that the second portion of Rayonier's brief is unanswerable.

ARGUMENT IN REPLY

Cause-in-Fact

The government attacks the qualifications of appellants' witnesses, Jones, Schaeffer and Jacobson, and their judgment as to what a prudent forest ranger would have done (G. Br. 41-42).

The government's attack on these witnesses is both unfair and unmeritorious. It is unfair because of the eminent stature of these distinguished gentlemen in their profession. The record of their unimpeachable qualifications and judgment follows: Cowan, Tr. VII 2305; Jones, Tr. VIII 2534; Schaeffer, Tr. VIII 2619; and Jacobson, Tr. IX 3034. It is unmeritorious because it disregards the fact that the district judge, contrary to the government's implications, did not discount or disbelieve any of these experts. All of the district judge's findings and conclusions on negligence were premised on the testimony of the very same witnesses (R. 238; Am. F. XVI, R. 234-35; Con. IV, R. 237).

These same experts testified that if the government had employed the fully and readily available fire fighting forces according to the standard of care which the district judge found to be applicable (R. 238), the fire could have been completely extinguished in the spot-fire stage (as the other six spot fires were) and, in any event, completely controlled and suppressed in sixty acres or less, either during the night of August 6-7 or during the forenoon of August 7 (R. Br. 36-54, especially 41-43 and 46-50). The government admits "several witnesses" so testified (G. Br. 39). Some of these

"several" were government experts relying on the Forest Service Fire Control Handbook and on the Forest Service Manual (R. Br. 41-42, 46-49). Thus, *all* the experts agreed that if the government had not been negligent, the fire would not then have spread into the 1600 acres (R. Br. 36-54, especially 41-43 and 46-50), No witness testified that the exercise of ordinary care would have been insufficient, inadequate or incapable of completely extinguishing the spot fire or of completely controlling and suppressing the fire during the afternoon or night of August 6 or the morning of August 7 (R. Br. 39, 53).

Therefore, the government's attack on the credibility and judgment of the experts begs the question. Under these circumstances, there has to be some other explanation for the district judge's holding that Rayonier failed to prove by a preponderance of the evidence that the government's negligence was a cause-in-fact of its damage.

The real question is whether the district judge erroneously required of Rayonier too strict a burden of proof (R. Br. 46, 50-54).

In support of the higher burden of proof the government argues that the district court was not compelled to accept opinion evidence as demonstrating that the use of a particular number of men would have controlled the fire (G. Br. 41).

This, too, begs the question. The point is: To require an injured party to prove "when" and "where" the fire could have been stopped and how many men and

how much equipment would have been required to do so at any given time or place is to force an impossible burden of proof upon the plaintiff, contrary to law and in frustration of substantial justice. Forest fire fighting experts simply do not often agree with unanimity on such detail. However, this should not obscure the fact that these experts—the government's as well as appellants'—agreed on the general proposition that the fire could have been completely extinguished as a spot fire or completely controlled and suppressed within the sixty acres during the remaining hours of August 6 and the morning hours of August 7, if the government continuously had used "ordinary and reasonable care" as broadly defined (R. 238; R. Br. 36-54, especially 41-43 and 46-50).

This is a situation where the district judge used the proper standard of proof in evaluating the expert testimony on standard of care (R. 238) and on negligence (Am. F. XVI, R. 234-35; Con. IV, R. 237), and then, in evaluating the testimony of the same witnesses on cause-in-fact, required of Rayonier a higher standard of proof, requiring it to show by a preponderance of the evidence that the fire could have been suppressed at an *exact* place at a *specific* time (Am. F. XVI, R. 235). The government would carry this to an absurdity by imposing an even higher standard requiring Rayonier to show by a preponderance of the evidence that the fire could have been suppressed at an exact place at a specific time by a certain number of men and a certain quanitity of material (G. Br. 39).

This is not a situation, as the government suggests,

where Rayonier has *assumed* " * * * that the district court found that the Forest Service was negligent in not employing that number of men mentioned in one or another of the estimates" (G. Br. 39). On the contrary, Rayonier does not *assume* anything. It relies on the record which speaks for itself and reveals that the district judge, after reviewing the expert testimony, established that "ordinary and reasonable care requires urgent speed, vigorous attack and great thoroughness in reaching and putting out fire in the forest" (R. 238). He also found that the district ranger was negligent because he failed "expeditiously and fully to perform such duty" (R. 240, 243); and "failed to act as promptly, vigorously and continuously" as he was "required to do" (Am. F. XVI, R. 234-35). This encompassed the widest range of substandard conduct during the entire period from noon time August 6 through the night of August 6-7 until 2:30 p.m., August 7.

And this is not a situation, as the government contends, where "it was for the trier of the fact to determine what weight should be attached to the different opinions expressed by witnesses of varying qualifications" (G. Br. 43) because these witnesses did not express a "different" opinion on the true point in issue, *viz.*: Could the fire have been suppressed by ordinary care in its initial stages? On that issue there was unanimity.

Finally, Rayonier wishes to emphasize again the fact that not only did the expert witnesses agree that the fire could have been extinguished at the spot-fire stage, but it is an uncontroverted fact that six other

spot fires, started at approximately the same time under the same general conditions, were so *extinguished*. The only possible explanation of the failure of the Forest Service to extinguish that seventh spot fire is its failure to take the "prompt, vigorous" action which the trial judge found it was bound to use. Floe did not even make a fair try. He was trying to make the PAW pick up the check.

Continuing Risk and Intervening, Superseding and Concurring Cause

Part One

The government has declined to answer on the merits Rayonier's argument on proximate and intervening cause (R. Br. 33, 54-72), on the ground that it "rests upon a state of facts other than that found" (G. Br. 60).

The government knows or should know full well that Rayonier's argument on proximate and intervening cause (R. Br. Part. II, 54-72) rests on the assumption that Rayonier's argument on cause-in-fact (R. Br. Part I, 36-54) will be sustained by this court.[3] A holding by this court that the district judge erred in the last two sentences of Amended Finding XVI (R. 235) will require a decision on the issues of proximate and intervening cause. In this light, argument on proxi-

[3] The government should have answered this issue in a manner similar to its argument on the existence of a duty to maintain the PAW right of way (G. Br. 60 *et seq.*) which "rests upon a state of facts other than that found" *viz.*, the assumption that appellants Arnhold *et al.*, may prevail on the cause-in-fact issue as it relates to negligent maintenance of government land, including the right of way. *The government's failure to answer Rayonier's argument on the merits when it has answered Arnhold, et al.'s argument on the merits strongly suggests that the government considered Rayonier's argument to be unanswerable.*

mate and intervening cause is relevant, and may become controlling.

Because the government's treatment of this matter leaves totally unanswered Rayonier's argument on proximate and intervening cause, the court's special attention is invited to Part II of Rayonier's opening brief (R. Br. 54-72) where the matter is fully discussed.[4]

Part Two

Nevertheless, statements in the government's brief (G. Br. 57-60) indicate an area of concurrence as between the government and Rayonier on the background of this important aspect of the case which should be brought to the court's attention at this point. Rayonier concurs with the government's contention that the district judge found it unnecessary to consider whether the September 20th weather was an act of God (G. Br. 59). Rayonier accepts the government's premise that the district judge did not reach this issue because, under his analysis of the case, the government's liability already had been foreclosed by the last two sentences of Amended Finding XVI (R. 235) that cause-in-fact had not been established.

However, the statements from the Memorandum Decision quoted in Rayonier's opening brief (R. Br. 59-60; R. 201-02, 203, 239) show that the district judge thought that if he were in error on cause-in-fact, the law in Washington was such that the government's liability might then turn on a question of fact, to-wit:

[4] See also Part One of Foreword, pp. 3-4, *supra*, part of which relates to the government's failure to answer this argument.

Whether the September 20th weather was an unforeseeable "act of God," and that the government might be exonerated from liability for its November 6th-7th negligence, if it were decided that the weather was in fact an unforeseeable "act of God."

In this he erred again because *this is not the law in Washington* (R. Br. 54-72).[5]

Rayonier realizes that this is not the same as alleging "error," as such, because the district judge did not make a specific ruling on this issue (R. 201; G. Br. 59). However, the district judge stated that if cause-in-fact had been found adversely to the government, he would have been required to decide whether or not the September 20th weather was an "act of God, as that term is meant in the law" (R. 201). This clearly indicates that he believed erroneously that "unforeseeable" weather could absolve the government from liability for its negligence and that he erroneously misconceived the term "concurrence" in this connection (R. Br. 60).

Therefore, this court not only should sustain Rayonier's contentions on the issue of cause-in-fact, but also should hold as a matter of law that the September 20th weather, irrespective of whether it is an "act of God," cannot exonerate the government from liability for its August 6th-7th negligence.

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[5] See, however, the district judge's statement of Washington law in the Memorandum Opinion (R. 180). This indicates that he was in general concurrence with Rayonier's views of the law on this issue, but intended erroneously to apply the rules to require that the negligence concur simultaneously with the act of God (R. Br. 60).

CONCLUSION

The government's initial negligence on August 6 clearly permitted a fire to exist which could have and should have been completely extinguished in the spot-fire stage, just as all the other nearby spot fires were extinguished that day. Its further negligence on August 6 and 7 permitted the existence and spread of the fire which could have and should have been completely controlled, suppressed and mopped up at any of various stages before 2:30 p.m., August 7. This further negligence permitted the fire to exist in a larger area, in more difficult terrain and increased its exposure time-wise to the risk of being spread further by wind.

If there had not been any initial negligence there would have been no fire in the 60 acres on August 7 for the wind to spread. If there had not been any *further* August 6th-7th negligence, the fire, if any, that may have existed at 2:30 p.m., August 7, would have been so completely controlled, suppressed and mopped up that the wind would not have spread it. In either such event, the fire could not have spread to the 1600-acres. Therefore, the government's negligence was a cause-in-fact of the existence of fire in the 1600 acres. All of the witnesses so testified and the district judge erred in failing to accord proper weight to this general concurrence of expert opinion.

The fire in the 1600 acres, thus negligently caused, was a continuing risk of harm until it was acted upon by the wind during the night of September 19th-20th and thus directly and proximately caused the damage to appellant when the September 19th-20th wind car-

ried the fire out of the 1600 acres into the surrounding property, some of which was Rayonier's.

The government's August 6th-7th negligence was the proximate cause of Rayonier's damage because: The harm that Rayonier suffered was within the scope of the general type of harm, a risk of which was created and increased by said negligence; the continuing risk of that harm did not expire prior to September 19th-20th; and the government's subsequent mop-up operations, even if prudent, did not insulate the government from liability.

The fortuitous weather of September 19th-20th cannot exonerate the government from liability for its August 6th-7th negligence because the September 19th-20th weather, acting alone, did not cause Rayonier's damage and because, as a matter of law, when a person's negligence has created a continuing risk which eventually is acted upon by a force of nature, even if that force is extraordinary, the person who has created the risk will be liable unless the harm suffered is of a kind entirely different from and outside the scope of the risk which made the defendant's conduct negligent.

It is respectfully submitted that the government is liable and this court should direct entry of judgment for Rayonier.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYONIER INCORPORATED, a Delaware corporation, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	NO. 16368 ERRATUM IN REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

On page 17, line 3, strike the word "November" and substitute in lieu thereof the word "August."

DATED this 22nd day of March, 1960.

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